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No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1960

WALTER ELWOOD KRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. 34-37, 40-45) are not yet reported. The opinion and order of the district court are reported at 172 F. Supp. 288.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1959. A petition for rehearing was granted on March 18, 1960, and on June 21, 1960, the court of appeals entered judgment affirming the

district court. On July 1, 1960, by order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to August 20, 1960. The petition for a writ of certiorari was filed on August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an improper verification of a bankruptcy petition prevents a conviction for concealing assets from a receiver in bankruptcy.

2. Whether an adjudication of bankruptcy, based upon service by publication after unsuccessful personal service less than five days before the return day, is sufficient to sustain a conviction for concealing assets from a receiver in bankruptcy.

STATUTES INVOLVED

18 U.S.C. 152:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt * * *
>
> * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 18(a) of the Bankruptcy Act, 11 U.S.C. 41(a), provides:

> Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpena, shall be made upon the person therein

named as defendant. Upon the filing of a voluntary petition in behalf of a partnership by less than all of the general partners, service thereof, with a writ of subpena, shall be made upon the general partner or partners not parties to the filing of such petition. Such service shall be returnable within ten days, unless the court shall, for cause shown, fix a longer time, and shall be made at least five days prior to the return day, and in other respects shall be made in the same manner that service of summons is had upon the commencement of a civil action in the courts of the United States; but in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the court shall otherwise direct, the order shall be published only once and the return day shall be five days after such publication.

* * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania on one count of an indictment charging the knowing and fraudulent concealment of property from the receiver of an estate in bankruptcy in violation of 18 U.S.C. 152 (Pet. 5-6). The conviction was affirmed on appeal.

The following facts are not disputed by petitioner:

Petitioner, in partnership with his wife, operated Kramer Builders in Pittsburgh (Pet. 31). On De-

cember 11, 1957, an involuntary petition in bankruptcy was filed in the United States District Court for the Western District of Pennsylvania against petitioner and his wife, individually and as partners doing business as Kramer Builders (Pet. 6).

A copy of the petition and a summons to petitioner and his wife were given to the United States Marshal on December 11, the summons returnable on December 21, 1957. The marshal did not attempt to serve petitioner until December 17, 1957, when he requested Joseph Passafiume, whom the creditors believed to be petitioner's attorney, to accept service on petitioner's behalf, which Passafiume refused to do. The marshal sought petitioner in the Pittsburgh area on December 17, 1957, and thereafter, but was unable to locate him. The record shows no order extending the time for personal service.

Permission for service by publication was secured on December 27, 1957, and publication was made in the Pittsburgh Press on December 30, 1957. Personal service was made on petitioner's wife in Florida on the same day. On January 30, 1958, petitioner and his wife, individually and as partners, were adjudicated bankrupts and a receiver appointed. A trustee of the bankrupt estate was appointed on March 20, 1958. Petitioner, who had gone to Florida on December 21, returned to Pittsburgh on March 19, 1958. On March 25, 1958, he appeared for questioning in a hearing under Section 21(a) of the Bankruptcy Act (11 U.S.C. 44). On April 22, 1958, he filed a petition for an arrangement under Section 321 of the Bankruptcy Act (11 U.S.C. 721).

The concealment charge on which petitioner was convicted alleged concealment from the receiver from December 20, 1957, to March 19, 1958, with intent to defraud the bankrupt estate and the creditors of the estate. On December 21, 1957, petitioner had left Pittsburgh and had picked up some of the partnership's heavy equipment which he had previously parked at the entrance to the Pennsylvania Turnpike, and transported it to Florida. It was recovered after the trustee in bankruptcy was appointed.

In the courts below (as in this Court), petitioner, who had not attacked the jurisdiction of the bankruptcy court in the bankruptcy proceeding, argued that the adjudication and the appointment of a receiver were void because (1) two of the petitioning creditors had not properly verified the petition before a notary public, and (2) service by publication was invalid since personal service had not been attempted until less than five days before the return day of the original subpoena. The district court ruled that any defects in the verification or in the service of the subpoena could be attacked only in the bankruptcy court, and not collaterally in the criminal proceeding (Pet. App. 33). The Court of Appeals, in its final opinion, took the same approach as to verification but considered the merits of the attack on service by publication, ruling that (Pet. App. 45) "if an attempt personally to serve an alleged bankrupt while he is within the state of the bankruptcy court has failed because it was not in accordance with the provisions of Section 18(a) and the bankrupt then leaves the state, service may be made by publication."

ARGUMENT

1. Petitioner does not challenge the sufficiency of the evidence to show that he knew that a bankruptcy proceeding was pending against him and that he willfully concealed assets. His contention is that the adjudication in bankruptcy and the appointment of a receiver were so totally void that he could not be found guilty of concealing assets from the receiver. The short answer to petitioner's contentions is that the mere filing of a petition in bankruptcy gives the bankruptcy court jurisdiction over the property of the putative bankrupt within the jurisdiction of the court. *Ex Parte Baldwin*, 291 U.S. 610, 615. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and the distribution of his estate. *Acme Harvester Co.* v. *Beekman Lum. Co.*, 222 U.S. 300, 307. Therefore, when the petition for involuntary bankruptcy was filed, petitioner was no longer free to deal with his property in such a way as to defeat the legitimate claims of the creditors. *Ex Parte Baldwin, supra.*

Directly in point is the decision of the Second Circuit in the case of *United States* v. *Agresti*, 130 F. 2d 152, where a petition, intended to be against Agresti, was filed against Marrone, a name which Agresti used. The court assumed, arguendo, that service by publication against Agresti under the name of Marrone was invalid. It held that, nevertheless, Agresti could be convicted of concealing assets from

the receiver of an estate of the bankrupt,[1] saying (*id.* at 154):

> * * * Therefore, at worst a petition was pending to adjudicate Agresti, under which a receiver was appointed who took possession of Agresti's property. This was "property belonging to the estate of a bankrupt" because under § 1(4) the word "bankrupt" includes a person against whom an involuntary petition has been filed. When the creditors elected that receiver as their trustee, the appointment may have been a nullity—depending again upon the sufficiency of the publication—but, even if so, the receiver remained a receiver in possession. Section 29, sub. b(1) makes it a crime to conceal assets "belonging to the estate of a bankrupt" from a receiver as well as from a trustee * * *.

2. In any event, petitioner's assertions of defects in the proceedings do not establish that the appointment of a receiver was invalid so as to be subject to attack in the criminal action.

(*a*). As to verification, the requirement of verification of petitions for involuntary bankruptcy is not jurisdictional in the strict sense. It may be waived by the bankrupt, or the court may permit the petitioners to perfect the verification. *Armstrong* v. *Fernandez*, 208 U.S. 324, 330; *In Re Royal Circle of Friends Building Corporation*, 159 F. 2d 539, 541-542 (C.A. 7). The instances in which a petition

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[1] It also held that the fact that the indictment charged concealment from a trustee rather than a receiver would be an immaterial variance. No such issue is involved here since the indictment charged concealment from a receiver.

improperly verified has been dismissed in the bankruptcy proceeding itself are those in which defects were also found in the substance of the averments. *E.g., In re Frank*, 239 Fed. 709 (C.A. 3); *In re Watauga Steam Laundry*, 7 F.R.D. 657, 659 (E.D. Tenn.). Petitioner does not claim any fraud in the substance of the allegations made in the involuntary bankruptcy petition. The defective verification is therefore not a basis for collateral attack in a criminal action. See *Edelstein* v. *United States*, 149 Fed. 636 (C.A. 8), certiorari denied, 205 U.S. 543; *Cajiafas* v. *United States*, 38 F. 2d 3 (C.A. 6); *United States* v. *Freed*, 179 Fed. 236, 237 (S.D. N.Y.).

(*b*). As to the service by publication, it is undisputed that petitioner was not in the district when service by publication was authorized and had not been there for six days. It is also undisputed that attempts to serve petitioner between December 17 and December 21, when he left the area, had proved futile. No attack is made on the manner of publication; rather, the argument is that the service by publication was invalid because personal service had not been attempted until less than five days before the return day of the original subpoena and no order extending the time for service had been obtained. As the court below pointed out, the literal reading of the statute, for which petitioner argues, would mean that any time there was a defect with respect to any attempted personal service there could be no service by publication even though the alleged bankrupt fled the state (Pet. 45). The court below

properly refused to interpret the statute to reach a result so at variance with the obvious purpose of its provisions. See *Romero* v. *International Terminal Co.*, 358 U.S. 354, 360; *United States* v. *Brown*, 333 U.S. 18, 25. The manifest purpose of the statute is to permit service by publication when it is impossible to effectuate personal service. Since in this case, at the time publication against petitioner was authorized, it was, and for some time had been, impossible to serve him personally, service by publication was proper and sufficient to confer jurisdiction on the bankruptcy court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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